

1 THE HONORABLE JUDGE ROBERT J. BRYAN
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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 CRAIG D. HANSON,

12 Plaintiff,

13 -vs-

14 COUNTY OF KITSAP, WASHINGTON; and
15 DAVID LYNAM, KITSAP COUNTY FIRE
16 MARSHAL; and, JOHN AND JANE DOE,
EMPLOYEE-AGENTS AND FORMER
EMPLOYEE-AGENTS OF KITSAP COUNTY

17 Defendants.

18 NO. 3:13-cv-05388-RJB

19 DEFENDANTS' MOTIONS IN LIMINE

20 Noted for consideration: 8/1/2014

21 Defendants Kitsap County and David Lynam, respectfully request that the Court enter an
Order in Limine prohibiting Plaintiff from commenting, referencing, alluding to, or presenting
certain evidence and/or testimony during trial or communicating to the jury in any way regarding
the matters referenced herein.

22 **I. LCR 16(d)(4) CERTIFICATION**

23 Counsel for both parties participated in a telephone conference on July 16, 2014 in a good
24 faith attempt to resolve the evidentiary matters in dispute. Declaration of Christy Palmer ¶2.
Identified below as "stipulated" motions are those motions in limine that both parties agreed upon.

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II. STIPULATED MOTIONS IN LIMINE

2 Plaintiff and Defendant agree to the following:

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A. Settlement Negotiations or Offers to Compromise.

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5 The Court should exclude any and all testimony or evidence regarding settlement
6 negotiations or offers to compromise between the parties as well as evidence of conduct or
7 statements made in settlement negotiations which are not otherwise admissible. Pursuant to Fed.
8 R. Evid. 408, evidence of offering or accepting consideration in an attempt to compromise a claim
9 is not admissible to prove liability or the invalidity of a claim or its value. Accordingly, evidence
10 or testimony regarding any discussions, or statements made during discussions, of any party in an
11 attempt to negotiate a settlement of the existing or resolved/dismissed claims should be precluded
12 from evidence at trial.

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B. Other Claims or Lawsuits Brought Against Defendant.

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15 The Court should exclude any and all evidence or testimony regarding other claims or
16 lawsuits made or filed against Defendants. Pursuant to Fed. R. Evid. 402, irrelevant evidence is
17 not admissible. Evidence is irrelevant when it has no tendency to make a fact regarding the
18 present lawsuit more or less probable. Fed. R. Evid. 401. Even relevant evidence may be
19 excluded if its probative value is substantially outweighed by a danger of unfair prejudice,
20 confusing the issues, undue delay or wasting time. Fed. R. Evid. 403. Furthermore, evidence of
21 other wrongs or past acts is not admissible to show that a party acted similarly on a particular
22 occasion. Fed. R. Evid. 404(b).

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24 Evidence and testimony regarding other past or concurrent lawsuits involving Defendants
25 will offer no probative value to a determination of liability or damages with respect to Plaintiff's
26 own claims of retaliation. The fact that Defendants have been sued in the past or involved in other
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RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083
www.kitsapgov.com/pros

1 lawsuits does not tend to prove that Defendants are liable in this matter. Such evidence is highly
2 prejudicial in that it will improperly influence the jury to rule against Defendants on a basis other
3 than the facts material to Plaintiff's claims.
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5 **C. Evidence Not Timely Disclosed Or Produced.**

6 The Court should exclude any and all evidence and testimony which was not timely
7 disclosed or produced by Plaintiff. The purpose of pre-trial discovery rules is to narrow and clarify
8 the basic issues between the parties and to disclose facts or the whereabouts of facts relative to
9 those issues such that parties can proceed to trial with the fullest possible knowledge of the facts.
10
11 *Hickman v. Taylor*, 329 U.S. 495, 500-501, 67 S.Ct. 385 (1947). The deadline for conducting
12 discovery in this matter was April 21, 2014, (Dkt. 30), with an extension of May 31, 2014 for the
13 limited purpose of allowing Defendants to conduct a medical examination of Plaintiff and disclose
14 expert testimony. Dkt. 87.
15

16 During the pre-trial phase, parties engaged in extensive discovery efforts, including the
17 exchanged of written interrogatories and requests for production as well as conducting depositions
18 of witnesses. Declaration of Christy Palmer, ¶3. To the extent that a party did not fully respond or
19 failed to disclose any facts or evidence responsive to discovery requests, that party should be
20 prohibited from presenting such evidence or testimony at trial. Exclusion of such evidence and
21 testimony will avoid undue prejudice and prevent trial by ambush.
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23 **D. Lay Witness Testimony Not Based Upon Personal Knowledge.**

24 The Court should exclude any and all testimony from lay witnesses not based upon
25 personal or first-hand knowledge. A witness may only testify to a matter with which he or she has
26 personal knowledge. Fed. R. Evid. 602. A lay witness may only testify in the form of an opinion
27 that is rationally based on the witness' perception. Fed. R. Evid. 701(a). Furthermore, witnesses
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1 are prohibited from recounting statements made out of court by other individuals to the extent the
2 statements are offered to prove the truth of the matter asserted in the statement. Fed. R. Evid. 801,
3 802. If a genuine question arises as to whether a hearsay exception or exemption applies, the
4 Court should carefully evaluate such exemptions or exemptions on a case-by-case basis.
5

6 **E. Classifying Acts As Retaliatory.**

7 The Court should prohibit lay witnesses from referring to, opining, or classifying
8 Defendants' conduct as retaliatory. Pursuant to Fed. R. Evid. 701, lay witness testimony in the
9 form of an opinion is limited to an opinion that is rationally based on a witness' perception, helpful
10 to understanding the witness' testimony or in determining a fact at issue, and not based upon
11 specialized knowledge. In this case, whether Defendants' conduct was retaliatory is the primary
12 legal issue to be decided by the jury. A lay witness without specialized knowledge of USERRA,
13 WLAD, retaliation, or of administrative or management functions is not qualified to offer an
14 opinion as to whether or not Defendants conduct is retaliatory. Furthermore, because this issue is
15 the very issue to be decided by the jury, baseless and unqualified lay witness testimony classifying
16 or branding Defendants' conduct as retaliatory would be prejudicial and will not assist the jury in
17 making a proper liability determination and should be excluded. Fed. R. Evid. 401, 403.
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19 **F. Expert Witnesses Not Timely Disclosed.**

20 The Court should exclude Plaintiff from presenting any evidence and/or testimony from
21 expert witnesses that were not disclosed by the expert witness disclosure deadline. The deadline
22 for the disclosure of expert witness testimony was April 9, 2014. Dkt. 30. This deadline was
23 extended to May 31, 2014 only for the limited purpose of allowing Defendants to conduct a
24 medical examination of Plaintiff and disclose expert testimony regarding the same. Dkt. 61, 72,
25 87. By April 9, 2014, Plaintiff had only disclosed one expert, Dwayne Normandeau, CPA.
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1 Plaintiff has not presented any expert report nor disclosed a detailed summary of the opinions of
2 any other expert witness. To prevent unfair prejudice and surprise, Plaintiff should be prohibited
3 from presenting the testimony or expert opinion of any expert witness other than Mr. Normandeau.
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5 **G. Reference to Motions In Limine.**

6 The Court should exclude any and all mention or reference to the fact that these motions in
7 limine were made prior to trial. Such a reference would be highly prejudicial and would
8 improperly suggest to the jury that a party is attempting to conceal material evidence.
9

10 **H. Liability Insurance.**

11 The Court should exclude all evidence or testimony regarding insurance. Pursuant to Fed.
12 R. Evid. 411, evidence that a person was or was not insured against liability is not admissible to
13 prove whether a person acted wrongfully. The Court should not permit Plaintiff to introduce
14 evidence regarding whether or not Defendants were insured because doing so may encourage the
15 jury to award damages based upon ability to pay rather than actual damages and may improperly
16 suggest that the Defendants acted wrongfully.
17

18 **I. Exclusion of Andrew Saxton, M.D. As A Witness.**

19 This Court should exclude the lay and/or witness testimony of Andrew Saxton, M.D.
20 During the July 16, 2014 conference, Plaintiff's counsel agreed not to call Dr. Saxton as a witness.
21 Declaration of Christy Palmer ¶4. For the reasons outlined below, Defendants seek an order
22 excluding his testimony from trial.
23

24 After the April 9, 2014 deadline to disclose expert witness had passed, Plaintiff served
25 supplemental initial disclosures identifying for the first time Andrew Saxton, M.D. as an expert
26 witness. Dkt. 69, pg. 4-6. This Court ruled that the limited extension of the expert witness
27 disclosure deadline did not apply to Plaintiff. Dkt. 72. Plaintiff did not express any further
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1 indication that he intended to call Andrew Saxton, M.D. as a witness at trial. Declaration of
2 Christy Palmer, ¶4. Plaintiff has not provided an expert witness report from Dr. Saxton nor has
3 Plaintiff presented a detailed summary of Dr. Saxton's opinions or testimony. Id. Plaintiff never
4 classified Dr. Saxton as a lay witness. Id. Dr. Saxton was never listed or identified as one of
5 Plaintiff's treating providers and Plaintiff never authorized the release of medical records from Dr.
6 Saxton. Id. To prevent unfair prejudice and avoid surprise at trial, Dr. Saxton should be
7 prohibited from testifying as an expert and a lay witness in this matter.

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9 **J. Attorneys As Witnesses.**

10

11 The Court should prohibit Plaintiff from calling any defense attorneys as witnesses at trial,
12 including but not limited to Jacquelyn Aufderheide. Following the July 16, 2014 conference,
13 Plaintiff's counsel agreed not to call Jacquelyn Aufderheide as a witness. Declaration of Christy
14 Palmer ¶5. For the reasons outlined below, Defendants seek an order excluding her testimony
15 from trial.

16

17 The advocate-witness rule prohibits an attorney from appearing as a witness and an
18 advocate in the same case. *U.S. v. Prantil*, 764 F.2d 548, 552-53, (9th Cir. 1985). This rule is
19 critical to the basic foundations of our system of justice and serves several purposes. *Id.* at 553.
20 One purpose of this rule is to prohibit the appearance of impropriety. *Id.* Another is to prevent
21 prejudice of a jury which may be improperly swayed by the prestige and prominence of a
22 government attorney. *Id.* This rule also prevents the confusion that may result from a jury having
23 to "segregate the exhortations of the advocate from the testimonial accounts of the witness. *Id.* In
24 addition, the testimony of the advocate attorney at trial results in a serious breach of professional
25 etiquette. Washington Rule of Professional Conduct 1.6(a), 1.8(b), 3.7, and comments thereto.

1 Such testimony may also be improper because it places the confidential communication
2 between an attorney and a client in jeopardy. RCW 5.60.060(2)(a)(“[a]n attorney or counselor
3 shall not, without the consent of his or her client, be examined as to any communication made by
4 the client to him or her, or his or her advice given thereon in the course of professional
5 employment.”). Furthermore, when a litigating attorney is called to take the stand, this
6 compromises the privilege of that attorney’s work product, strategy, and mental impression. Fed.
7 R. Civ. P. 26(b)(3)(B)(the court must “protect against disclosure of the mental impressions,
8 conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the
9 litigation.”)

10 In his initial disclosures, Plaintiff identifies Jacquelyn Aufderheide, one of Defendants’
11 attorneys, as a witness for this case. Declaration of Christy Palmer ¶5. Ms. Aufderheide is a Chief
12 Deputy Prosecuting Attorney employed by the Kitsap County Prosecuting Attorney. Id. Among
13 other things, Ms. Aufderheide is responsible for offering employment-related legal advice to
14 Kitsap County departments. Id. With respect to this case, Ms. Aufderheide’s involvement has
15 been limited solely to advising the Fire Marshal’s Office, payroll department, and other
16 departments regarding employment-related matters involving Plaintiff and his re-employment with
17 Kitsap County. Id. Any personal knowledge of the facts of this matter by Ms. Aufderheide was
18 obtained solely through her role as legal advisor. Id. Any and all communications between Ms.
19 Aufderheide and Kitsap County employees constitutes attorney-client privilege. Any knowledge
20 of material facts obtained through other means was obtained in anticipation of litigation and
21 constitutes privileged attorney work product.

22 Because all information and knowledge of Ms. Aufderheide is privileged, she will not be
23 able to offer testimony on any matter relevant to the issues proceeding to trial. With regard to the

1 specific facts at issue in this matter, Ms. Aufderheide has no knowledge which is unique or
2 different from any other lay witness. Plaintiff's attempt to call Ms. Aufderheide as a witness at
3 trial is merely an attempt to intimidate and harass Defendants. Ms. Aufderheide's testimony, and
4 the testimony of all other defense counsel, should be excluded on the basis that it is irrelevant,
5 improper, prejudicial, violates attorney-client confidences, and improperly jeopardizes privileged
6 attorney work product.

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8 **K. Barbara Razey-Simmons Investigation And Report.**

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10 The parties agree that this Court should exclude all evidence and testimony regarding
11 Barbara Razey-Simmons' investigation and September 27, 2013 report including the fact that she
12 conducted an investigation, the substance of her report, and that she is not licensed. Barbara
13 Razey-Simmons was retained by Kitsap County's HR division to conduct an internal personnel
14 investigation regarding workplace complaints outlined in Plaintiff's May 1, 2013 Notice of Tort
15 Claim. Dkt 17, ¶¶6. As part of her investigation, Ms. Razey-Simmons reviewed several
16 documents, interviewed several Kitsap County employees and prepared a report regarding her
17 findings which included a summary of witness interviews. Declaration of Christy Palmer ¶6. The
18 only retaliation allegation that Ms. Razey-Simmon investigated was whether Defendants retaliated
19 against Plaintiff by failing to provide him with equipment. Id.

20

21 Plaintiff repeatedly argued during summary judgment that Ms. Razey-Simmons is not a
22 licensed investigator. Dkt. 97, pp. 5, lines 18-20, pp. 6, lines 1-2. However, Plaintiff provided no
23 authority for his position that internal personnel investigations must be conducted by a licensed
24 investigator. Id. Furthermore, the fact that Ms. Razey-Simmons is not licensed has no bearing on
25 whether Defendants retaliated against Plaintiff.

26

27 Evidence and testimony regarding Ms. Razey-Simmons' investigation and report should be

1 excluded because such evidence will not provide the basis for any claim or defense presently
2 before the Court, is wholly irrelevant, prejudicial, likely to confuse the issues, and based
3 substantially on inadmissible hearsay. The fact that Ms. Razey-Simmons investigated allegations
4 not at issue in the claims proceeding to trial and the substance and findings of her investigation
5 offers no probative value to the issues presently before this Court—whether Defendants retaliated
6 against Plaintiff in selecting Jackie Blackwood for the DFM 2 position instead of Plaintiff. Fed. R.
7 Evid. 401, 402. Ms. Razey-Simmons' investigation does not touch on any facts that are material to
8 these claims as her primary focus was workplace harassment and hostile work environment.

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11 While offering no probative value, evidence regarding Ms. Razey-Simmons' investigation
12 will likely confuse the jury by raising facts and allegations related to claims that the jury will not
13 be asked to decide. Fed. R. Evid. 403. In addition, evidence regarding the investigation will be
14 highly prejudicial because Plaintiff's unfounded allegations against Defendant may have the
15 improper effect of portraying Defendants as habitual violators and unconcerned employers. Fed.
16 R. Evid. 403. The jury's determination on the present issues is likely to be unfairly swayed by this
17 inaccurate portrait of Defendants which is based solely on Plaintiff's subjective perspective.
18 Testimony and evidence that Ms. Razey-Simmons is not licensed, even though the law does not
19 require her to be, is likely to unfairly suggest to the jury that the Defendant acted improperly in its
20 investigation, which has no bearing on any fact material to the present claims.

21
22 Finally, with respect to Ms. Razey-Simmons' report, this report is replete with inadmissible
23 hearsay. Fed. R. Evid. 801, 802. The report itself is hearsay because it is an out-of-court
24 statement of Ms. Razey Simmons. In addition, the investigation summarizes Ms. Razey-Simmons'
25 interviews of several Kitsap County employees. The interview summaries are the substance of the
26 report and constitute approximately 24 pages of the 33 page report. Declaration of Christy Palmer
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RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083
www.kitsapgov.com/pros

1 ¶7. In several instances, the report summarizes statements recounted to the interviewee by a third
2 party. Id. In this respect, the report does not just contain hearsay, it contains hearsay-within-
3 hearsay, as well as hearsay-within-hearsay-within-hearsay. The multiple levels of hearsay
4 combined with the lack of any probative value and the prejudicial effect of the evidence warrants
5 that the Court exclude from trial any and all evidence or testimony regarding Ms. Razey-Simmons'
6 investigation and report.

7

8 **L. Exclusion of Kimberly Green As A Witness.**

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10 This Court should exclude the lay witness testimony of Kimberly Green. Plaintiff
11 identified Ms. Green as a lay witness in his pretrial statement. Declaration of Christy Palmer ¶8.
12 He disclosed that Ms. Green is anticipated to testify regarding her interactions with Plaintiff in
13 2012 and 2013. Id. Following the July 16, 2014 conference, Plaintiff's counsel agreed not to call
14 Ms. Green as a witness. Declaration of Christy Palmer ¶8. For the reasons outlined below,
15 Defendants seek an order excluding her testimony from trial.

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17 During discovery, Ms. Green provided a declaration outlining her likely testimony at trial.
18 Dkt. 101. In her declaration, Ms. Green talks about her interactions with Defendant over the
19 several months prior to his resignation from Kitsap County. Id. Ms. Green's declaration also
20 states that she recommended Plaintiff leave Kitsap County because of the harmful work
21 environment. Id. Ms. Green makes several other statements regarding Plaintiff's alleged damages
22 and Defendants' alleged conduct. Id.

23

24 According to the medical records provided by Ms. Green's office, she saw and treated
25 Plaintiff only two times after his re-employment with Kitsap County. Declaration of Christy
26 Palmer ¶8. She saw him once on December 7, 2012 and again on March 11, 2013. Id. Both of
27 these visits took place prior to the alleged acts of retaliation. From her own records, it is clear that
28

1 Ms. Green lacks any personal knowledge regarding Plaintiff's claims and damages because she did
2 not treat or see him after March 11, 2013. Accordingly, any allegations and statements of Ms.
3 Green relevant to the remaining claims are based solely on hearsay and speculation. As Plaintiff's
4 medical provider, Ms. Green also lacks personal knowledge regarding the conduct of the
5 Defendant. Fed. R. Evid. 701(a) limits a lay witness' testimony to only those opinions rationally
6 based on the witness' perception. Because Ms. Green's testimony is not based upon personal
7 knowledge, Ms. Green is not a proper lay witness and should be excluded from testifying.
8

9 To the extent Ms. Green is permitted to testify, her testimony should be limited to her
10 personal observations on or prior to March 11, 2013. Ms. Green should be prohibited from
11 providing any testimony regarding facts of how the alleged retaliation impacted Plaintiff's
12 psychological condition or his life in general. Furthermore, she should be prohibited from offering
13 any testimony as to the conduct of the Defendants as her knowledge with respect to such conduct
14 is based solely on inadmissible hearsay.
15

16 **M. Collective Bargaining Agreement.**

17 The parties agree that the Collective Bargaining Agreement ("CBA") between Kitsap
18 County and Plaintiff's former union should be permitted as evidence at trial.
19

20 **III. CONTESTED MOTIONS IN LIMINE**

21 **N. Available Witnesses Not Called To Testify.**

22 The Court should prohibit any party from mentioning or referencing the fact that an
23 available potential witness was not called to testify. Such a reference would be highly prejudicial
24 and would improperly suggest to the jury that a party is attempting to conceal material evidence.
25 During the July 16, 2014 telephone conference, Plaintiff's counsel disagreed with this motion to
26 the extent it applied to Gordon Jacobson and indicated his intent to reference during trial the fact
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1 that Mr. Jacobson was not called to testify and that Defendants declined to waive their
2 confidentiality with respect to communications with Mr. Jacobson. Declaration of Christy Palmer
3 ¶9.
4

5 Plaintiff should be prohibited from referencing the fact that any other witness, including
6 Mr. Jacobson, is not being called to testify. Plaintiff should also be prohibited from referencing
7 the fact that Defendants declined to waive confidentiality with respect to any witness, including
8 Mr. Jacobson. Dispute resolution proceedings are confidential pursuant to 5 U.S.C. §574(b). This
9 provision expressly provides that a party to a dispute resolution proceeding “shall not voluntarily
10 disclose or through discovery or compulsory process be required to disclose any dispute resolution
11 communication” absent written consent of all parties. Id. The fact that Defendants chose not to
12 waive their statutory right to privilege should not be used against Defendants. Not only would this
13 defeat the purpose of the statutory privilege, it would improperly infer that Defendants are
14 concealing material evidence.
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17 **O. Attorney-Client Communication.**

18 The Court should exclude all evidence and testimony regarding communications made
19 between Defendant and Defendants’ counsel, including the very fact that such communications
20 took place at all. Any evidence or testimony regarding whether communication with counsel took
21 place and/or the substance of those communications should be excluded from trial on the basis that
22 they are protected by the attorney-client privilege set forth in RCW 5.60.060(2)(a).
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25 During the July 16, 2014 telephone conference, Plaintiff’s counsel disagreed with this
26 motion in limine to the extent it applies to medical records, specifically the medical records of
27 Jody Stewart, MA, LMHC. Declaration of Christy Palmer ¶10. Plaintiff’s counsel objected to the
28 use of Ms. Stewarts’ medical records as exhibits on the basis that some records contain references

1 which constitute attorney-client privilege. Id. Defendants have reviewed the medical records and
2 could find no attorney-client privileged information. Id. The medical records do make limited
3 references to communication between Plaintiff's counsel and his medical providers. Id. This does
4 not constitute attorney-client privilege because it is not a communication between Plaintiff and his
5 attorney. According to RCW 5.60.060(2)(a), the privilege applies only to communication "made
6 by the client to [the attorney] or [the attorney's] advice given thereon."

7 The medical records also contain limited references of a harmless and non-sensitive nature
8 made by Plaintiff to his medical providers regarding the retention of an attorney, the status of his
9 lawsuit, and requests for declarations. Id. To the extent Plaintiff discussed his lawsuit with
10 medical providers, he waived any privilege that may have applied. *Morgan v. City of Federal*
11 *Way*, 166 Wn.2d 747, 757, 213 P.3d 596 (2009)(disclosure to third party results in waiver of
12 attorney-client privilege).

13 If this Court disagrees and determines that such references constitute attorney-client
14 privilege, these references can be redacted without having to exclude the entirety of Plaintiff's
15 medical records. Plaintiff is claiming psychological damages. His medical records are critical to
16 establishing and defending his damages claims and should not be excluded in their entirety just
17 because there are a few non-sensitive and non-confidential references to Plaintiff's counsel.

18 **P. Dismissed And Resolved Claims And Allegations Relevant Thereto.**

19 The Court should exclude any and all testimony and evidence related to claims that have
20 already been dismissed or resolved prior to trial and all allegations and facts related to the same.
21 Critically, the parties disagree as to which claims have been dismissed/resolved and which claims
22 are remaining and seek the Court's guidance on this issue. It is Defendants understanding that on
23 summary judgment, the Court dismissed all claims involving hostile work environment,
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1 constructive discharge, failure to re-employ, failure to provide equipment and training, violations
2 of the ADA, discrimination on the basis of Plaintiff's veteran status, defamation, and violations of
3 the public records act. Dkt. 136. In addition, Plaintiff's claims regarding his longevity bonus have
4 also been resolved as Defendants have issued payment to Plaintiff, with interest, for his 2012
5 longevity bonus on March 28, 2014. Dkt. 84; Dkt 119. Similarly, Defendants issued payment to
6 Plaintiff for additional retirement contributions in an amount calculated by the Department of
7 Retirement Services. Id. This amount exceeds the amount determined to be owed by Plaintiff's
8 own expert witness and also includes an additional amount for prejudgment interest. Id.
9

10 Allegations involving the dismissed and resolved claims should be excluded because they
11 are irrelevant, highly prejudicial, will likely confuse the jury, and result in a waste of judicial
12 resources. Pursuant to Fed. R. Evid. 402, irrelevant evidence is not admissible. Evidence is
13 irrelevant when it has no tendency to make a fact regarding the present lawsuit more or less
14 probable. Fed. R. Evid. 401. Here, evidence of allegations involving unrelated dismissed and
15 resolved claims have no tendency to prove or disprove any element or fact that is material to the
16 limited issues proceeding to trial: whether Defendants retaliated against Plaintiff. Evidence
17 relevant to the remaining claims is limited solely to Defendants' motive in selecting Jackie
18 Blackwood, not Plaintiff, for the DFM 2 position. Allegations of other instances of wrongdoing
19 will have no bearing on this discrete issue.

20 Furthermore, even relevant evidence may be excluded if its probative value is substantially
21 outweighed by a danger of unfair prejudice, confusing the issues, undue delay, or wasting time.
22 Fed. R. Evid. 403. In the context of Rule 403, undue prejudice means a tendency to influence the
23 jury to come to a certain conclusion on an improper basis. *Arizona, Dept. of Law, Civil Rights Div.*
24 v. ASARCO, L.L.C.

25 , 844 F.Supp.2d 957, 962 (2011). Most commonly, the improper basis is an
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RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083
www.kitsapgov.com/pros

1 emotional reaction or some other non-rational response which tends to adversely affect the jury's
2 attitude towards a party. *Id.*; *U.S. v. Bailleaux*, 685 F.2d 1105, 1111 (9th Cir. 1982), *modified on*
3 *unrelated grounds by U.S. v. Miller*, 874 F.2d 1255 (9th Cir. 1989). Evidence is prejudicial if it
4 "appeals to the jury's sympathies, arouses its sense of horror, provokes its instincts to punish, or
5 triggers other mainsprings of human action." *U.S. v. Blackstone*, 56 F.3d 1143, 1146 (9th Cir.
6 1995) *citing* 1 *Weinstein's Evidence* § 403[3], pp. 43–44.

7 In this case, allegations of unrelated resolved claims (most of which have been determined
8 to be unfounded), are highly prejudicial in that they are likely to unfairly sway the jury in ruling
9 against the Defendants for reasons other than facts material to the remaining claims. Even though
10 these claims have been resolved or determined to be unfounded, the jury may be swayed to
11 respond emotionally to Plaintiff's allegations by feeling sympathy towards Plaintiff or anger or
12 horror towards Defendants. These feelings may influence the jury's determination of liability with
13 respect to the unrelated claims of retaliation. Furthermore, because the unrelated allegations will
14 offer nothing to assist the jury in making a determination as to the claims at issue, their admission
15 as evidence during trial will also waste judicial time and resources and confuse the jury regarding
16 the actual issues in dispute.

17 For all the reasons set forth above, the Court should exclude all evidence and testimony of
18 allegation related to the resolved and dismissed claims including, but not limited to, the following:

- 20 • Any allegations that Plaintiff's coworkers were hostile, unfriendly, or exclusive;
- 21 • Any allegation that Defendants discriminated against Plaintiff on the basis of his
22 status as a veteran;
- 23 • Any allegations that Defendants or Plaintiff's managers /supervisors failed to
24 provide him with equipment and training such as a computer, badge, ID card, phone
25 case, vehicle, call sign, boots, Fire Marshal badge, out-of-state training, fire
26 investigation training, or shirt (however, Plaintiff may testify regarding the
27 substance of his ESGR complaint);

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RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083
www.kitsapgov.com/pros

- Any allegation that supervisors or managers did not respond to complaints related to coworkers, requests for equipment and training, and/or requests to hold a meeting to discuss the way coworkers were treating Plaintiff;
- Any allegation that extra-help employees were improperly retained upon Plaintiff's return;
- Any reference to the length of time that extra-help employees were retained following Plaintiff's return;
- Any reference to Kitsap County's Extra Help policy;
- Any reference to Plaintiff being labeled a "DFM 2" in the Kitsap County organization chart or in any letter from Defendants addressed to Plaintiff;
- Any reference or mention of Plaintiff's emails to Mr. Lynam complaining of harassing behavior by coworkers or being ostracized/ignored and complaining of not having been provided with equipment or training;
- Any allegation that Plaintiff's old badge and call sign were given to other employees;
- Any reference that Defendants did not promote Plaintiff to a DFM 2 position in 2007 or that Plaintiff applied for this position;
- Any reference or allegation that Defendants did not allow Plaintiff to interview for a DFM 2 position in 2007;
- Any allegation that Defendants failed to put Plaintiff on the fire investigation rotation immediately upon his return;
- Any allegation that Plaintiff would have been promoted to a DFM 2 position had he not gone on military leave;
- Any allegation that the qualifications for a DFM 1 or DFM 2 position were lowered for Jackie Blackwood;
- Any allegation that Jackie Backwood was not qualified for the DFM 1 or DFM 2 position;
- Any allegation that David Lynam instructed coworkers to "spy" on Plaintiff;
- Any allegation that David Lynam instructed or asked others not to write a positive recommendation for Plaintiff;

- 1 • Any allegation that David Lynam encouraged Plaintiff to apply for employment
2 outside Kitsap County;
- 3 • Any allegation that Defendants failed to re-employ Plaintiff as DFM 2;
- 4 • Any allegation that Defendants retaliated against Plaintiff for his act of filing a
5 Notice of Tort Claim or a Complaint for Damages;
- 6 • Any allegation that Defendants formally disciplined Plaintiff after his re-
7 employment;
- 8 • Any allegation that Defendants did not allow Plaintiff to have access to coworker
9 calendars;
- 10 • Any allegation that the May 1, 2013 meeting between Plaintiff and Defendants was
11 improper, constituted harassment or discrimination, or was otherwise unlawful;
- 12 • Any allegation that Defendants failed to accommodate Plaintiff's PTSD or any
13 other medical or psychological condition;
- 14 • Any allegation that Plaintiff was constructively discharged or that he felt compelled
15 to resign due to Defendants' conduct;
- 16 • Any allegation that Defendants' conduct (other than the retaliation issues
17 proceeding to trial) was the cause of an increase or exacerbation of Plaintiff's
18 physical and psychological symptoms;
- 19 • Any allegation that Defendants failed to pay Plaintiff a longevity bonus; and
- 20 • Any allegation that Defendants failed to properly pay Plaintiff's retirement
21 benefits/PERS contributions.

22 **Q. Statements Of ESGR Ombudsman Gordon Jacobson.**

23 The Court should exclude all evidence and testimony regarding statements made by
24 Gordon Jacobson as well as all confidential communication and should also preclude Plaintiff from
25 stating or inferring that Defendants refused to waive their privilege with respect to ESGR
26 communication. In January 2013, Plaintiff complained to the ESGR regarding his reemployment
27 with Kitsap County. The ESGR initiated informal dispute resolution proceedings between the
28 parties. Communications regarding such proceedings is confidential pursuant to 5 U.S.C. §574(b).

1 This includes both verbal as well as written communication. 5 U.S.C. §571.

2 During discovery, Plaintiff attempted to obtain information regarding the identity of the
3 Kitsap County agent who declined to waive confidentiality with respect to such communications.
4 The Court issued an order protecting the discovery of this information. Dkt. 57, pp. 5. During
5 summary judgment proceedings, Plaintiff offered hearsay statements attributed to ESGR
6 Ombudsman Gordon Jacobson, including a statement that Defendants failed to respond or follow-
7 up with Mr. Jacobson. Defendants anticipate that at trial Plaintiff will testify regarding this
8 hearsay statement and will also attempt to refer to the fact that Defendants refused to waive their
9 confidentiality with respect to the privileged ESGR communications.

10 Such evidence and testimony should be excluded for several reasons. First, dispute
11 resolution communications between Kitsap County and ESGR are confidential. 5 U.S.C. §574(b).
12 This provision expressly provides that a party to a dispute resolution proceeding “shall not
13 voluntarily disclose or through discovery or compulsory process be required to disclose any
14 dispute resolution communication” absent written consent of all parties. Id.

15 This evidence and testimony should also be excluded on the basis that it constitutes
16 inadmissible hearsay. Plaintiff will likely attempt to testify regarding alleged statements that
17 Kitsap County made to Mr. Jacobson, recounted by Mr. Jacobson to Plaintiff. Plaintiff has no first
18 hand knowledge of these statements, which were made out-of-court. There is no way to judge the
19 veracity of these statements or the fact that they even occurred at all.

20 Finally, in addition to being inadmissible hearsay as well as confidential communication,
21 such evidence and testimony will prejudice plaintiff without offering any probative value. The
22 intended affect of these unsubstantiated statements is to paint Defendants as a callous employer in
23 such a way as to improperly influence the jury in ruling against Defendants, regardless of whether

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083
www.kitsapgov.com/pros

1 the Defendants acted contrary to law. This statement offers no probative value because the issue
2 before the Court is not whether Defendants properly addressed Plaintiff's ESGR complaint or
3 whether Defendants properly participated in the dispute resolution proceedings that followed (if
4 this were the case, Defendants would present evidence regarding these issues), but rather, whether
5 they selected Jackie Blackwood for the DFM 2 position instead of Plaintiff because Plaintiff made
6 the ESGR complaint. If Plaintiff were permitted to offer irrelevant evidence regarding issues that
7 are not presently before the Court, Defendants would be compelled to introduce its own evidence
8 to contradict Plaintiff's arguments. This would only result in unnecessary confusion, distract the
9 jury from the actual claims at issue, and waste judicial resources.
10

11

12 **R. Economic Damages.**

13 The Court should prohibit Plaintiff from offering evidence or testimony regarding alleged
14 economic damages for resolved and dismissed claims. Specifically, the economic damages
15 testimony of Plaintiff and his expert witness, Dwayne Normandeau, CPA should be limited to
16 damages incurred between the time of Defendants' alleged retaliation, which began in May 2013,
17 to the time Plaintiff left Kitsap County in August 2013. In dismissing Plaintiff's constructive
18 discharge claims, the Court has ruled that Defendants are not responsible for Plaintiff's decision to
19 resign from the Fire Marshal's Office. Accordingly, any damages related to wages and benefits
20 are cut-off at the point in which Plaintiff voluntarily left Kitsap County in August 2013.
21

22 The majority of federal circuits recognize a doctrine called the "constructive discharge
23 rule." *Brown v. District of Columbia*, 768 F.Supp.2d 94, 104 (D.D.C. 2011). While Defendants
24 could not find a case discussing this rule in the USERRA context, it is routinely applied in Title
25 VII claims. *Id.* When considering USERRA claims, courts apply the framework for Title VII
26 claims. *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1267 n.7 (9th Cir. 1997).

1
2 Under the constructive discharge rule, a plaintiff may not be awarded damages incurred
3 following the time of a voluntary resignation unless the plaintiff can establish a constructive
4 discharge claim. *Id.*; *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 657-61 (7th Cir. 2005)(holding it
5 was improper to award front and back pay on retaliation claim where plaintiff did not establish
6 constructive discharge); *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 755 (3rd Cir. 1997) (“Courts of
7 appeals ‘have been nearly unanimous in their application of the constructive discharge rule,
8 whereby victorious Title VII plaintiffs who have left their employment with the defendant but who
9 were not constructively discharged by the defendant are only entitled to a remedy covering the
10 period during which the discrimination occurred up to the date of resignation.’”); *Muller v. U.S.
11 Steel Corp.*, 509 F.2d 923, 930, (10th Cir. 1975).

12 Washington Courts, when asked to apply this doctrine under the WLAD to a disability
13 discrimination claim, held that the constructive discharge rule applies only to cases involving
14 promotion/demotion. *Martini v. Boeing Co.*, 88 Wn. App. 442, 462-63, 945 P.2d 248 (1997). The
15 rationale behind applying this rule in promotion/demotion cases is to encourage employees to
16 “remain to work with supervisors within the existing job setting and not quit at the first sign of
17 discrimination.” *Id.* at 463. The constructive discharge rule is also recognized by the Ninth Circuit
18 Court. *Satterwhite v. Smith*, 744 F.2d 1380, 1381 n.1 (9th Cir. 1984).

19 Accordingly, Plaintiff and his expert witness should be prohibited from providing any
20 evidence or testimony regarding work-life expectancy, front pay, and continuing lost wages and
21 benefits.

22 Testimony and evidence regarding economic damages should further be limited to
23 economic damages caused solely from the allegations of retaliation. Accordingly, Plaintiff and his
24

1 expert witness should be prohibited from providing any evidence or testimony regarding lost
2 earnings related to the retention of extra-help employees and all other unrelated economic
3 damages.
4

5 Because the Court has dismissed claims for constructive discharge and failure to re-
6 employ, testimony other than damages incurred between the time of Defendants' alleged
7 retaliation and the time Plaintiff left Kitsap County will offer no probative value with respect to the
8 present claims and will only result in prejudice to the Defendants, confusion of the issues, and
9 waste of time and judicial resources. Fed. R. Evid. 403.
10

11 S. Noneconomic Damages.

12 The Court should prohibit Plaintiff from offering evidence or testimony regarding alleged
13 noneconomic damages for resolved and dismissed claims. The status of Plaintiff's psychological
14 condition prior to and following the alleged acts of retaliation may be relevant to determining the
15 extent that Defendants' alleged conduct of retaliation impacted Plaintiff's condition and should be
16 permitted. However, Plaintiff should be prohibited from introducing evidence or testimony or
17 making any comment, reference, or suggestion that any other conduct of the Defendant, including
18 allegations related to Plaintiff's dismissed claims of harassment, status-based discrimination,
19 hostile work environment, and failure to re-employ, had any impact on his psychological condition
20 at any time during or after his employment with Kitsap County. Plaintiff should be prohibited
21 from introducing evidence or testimony that any conduct of the Defendant, aside from the
22 remaining claims of retaliation, worsened his condition.
23
24

25 Such evidence is irrelevant to the issue of whether Plaintiff suffered economic damages as
26 a result of retaliation. Fed. R. Evid. 401. Furthermore, because the Court has dismissed claims for
27 constructive discharge, hostile work environment, and failure to re-employ, such testimony will
28

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083
www.kitsapgov.com/pros

offer no probative value with respect to the remaining claims and will only result in prejudice to the Defendants, confusion of the issues, and waste of time and judicial resources. ER 403. If Plaintiff were permitted to offer evidence that unrelated lawful acts of the Defendants impacted his psychological condition, then the jury would be encouraged to rule in Plaintiff's favor on an improper basis, such as sympathy for Plaintiff or feelings of anger or retribution towards Defendants.

T. Disparate Treatment.

This Court should exclude any and all evidence and testimony regarding how Kitsap County responded to Ms. Blackwood's formal written complaint against Plaintiff. In responding to Defendants' Motion to Bifurcation, Plaintiff suggested that he would present evidence at trial regarding how Kitsap County responded to Ms. Blackwood's written complaint to show disparate treatment and to establish Plaintiff's retaliation claim. Dkt. 152, pp. 3. This evidence should be excluded on the basis that it is irrelevant and prejudicial without offering any probative value.

Evidence of "disparate treatment" with regard to Ms. Blackwood has no tendency to make a fact regarding Plaintiff's retaliation claims more or less probable under Fed. R. Evid. 401(a). Retaliation under USERRA is established by showing that (1) Plaintiff engaged in a protected activity, (2) Defendants took an adverse employment action against Plaintiff, and (3) Plaintiff's protected activity was a motivating factor in the adverse employment action. 38 U.S.C. § 4311(b), (c)(2). The fact that Kitsap County did not retaliate against Ms. Blackwood will not establish that they did retaliate against Plaintiff. How Kitsap County responded to Ms. Blackwood's complaint, which was made on June 4, 2013, (Dkt. 92, ¶8), will not establish that Plaintiff's filing of an ESGR complaint was a motivating factor in Defendants' decision in April 2013 to promote Jackie Blackwood instead of Plaintiff or to remove him from the fire investigation rotation in May 2013.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083
www.kitsapgov.com/pros

1 Disparate treatment is simply not a factor in a retaliation claim. Rather, it is an entirely
2 separate claim in and of itself. Disparate treatment is the very crux of a status-based
3 discrimination claim. Plaintiff's status-based discrimination claims have been dismissed by the
4 Court.
5

6 In addition to offering no probative value to Plaintiff's claims, this evidence will result in
7 undue prejudice by having a tendency to influence the jury in ruling against Defendants based on
8 an emotional reaction rather than based upon the relevant facts and legal standards. Furthermore,
9 if Plaintiff presented evidence regarding disparate treatment, Defendants would have to introduce
10 counter evidence and will have to cross-examine Plaintiff's witnesses regarding this issue in order
11 to disprove Plaintiff's irrelevant allegations. This will not only confuse the jury but will distract
12 the jury from the real claims at issue in this matter and waste judicial time and resources. Fed. R.
13 Evid. 403.
14

15 **U. Reasons for Leaving Kitsap County.**

16 This Court should exclude any and all evidence and testimony regarding the purported
17 reasons for Plaintiff resigning from his position with Kitsap County. In responding to Defendants'
18 Motion to Bifurcation, Plaintiff suggested that he would present evidence at trial regarding the
19 reasons why he left his job with Kitsap County in August 2013. Dkt. 152, pp. 3-4. All such
20 evidence and testimony should be excluded on the basis that it is irrelevant and prejudicial.
21
22

23 Evidence regarding why Plaintiff left Kitsap County in 2013 has no bearing on whether
24 Defendants retaliated against him in April or May 2013. Fed. R. Evid. 401. Furthermore, the only
25 reason to introduce such evidence would be to suggest or infer that Plaintiff left Kitsap County due
26 to Defendants' conduct. This is improper because the Court has dismissed Plaintiff's constructive
27 discharge claims and it would improperly suggest that the jury should rule against Defendants for
28

1 reasons unrelated to the present claims at issue. Fed. R. Evid. 403.
2

3 **V. Medical Records From Ms. Green Not Provided to Defendants.**

4 This Court should exclude evidence and testimony regarding records of Kimberly Green
5 that were not provided to Defendants. During discovery, Defendants issued a subpoena to
6 Kimberly Green requesting a copy of all of her records related to Plaintiff. Declaration of Christy
7 Palmer ¶8. Ms. Green provided a number of records documenting Plaintiff's care with her. With
8 respect to treatment after Plaintiff was re-employed with Kitsap County, Ms. Green provided only
9 two records, one dated December 7, 2012 and another dated March 11, 2013. Id. The records
10 provided by Ms. Green did not include a copy of her signed declaration. Id. Defendants suspected
11 that there may be additional treatment records that were not provided but Ms. Green assured
12 Defendants' counsel that she had provided all records in her possession related to Plaintiff. Id. To
13 the extent that Ms. Green did not provide all records related to Plaintiff, Plaintiff should be
14 prohibited from offering evidence or testimony regarding any such records or additional treatment
15 sessions.
16

17 **W. Organizational Chart.**

18 The Court should exclude all evidence and testimony regarding a Kitsap County 2012
19 organizational chart which incorrectly identifies Plaintiff as a DFM 2. In Plaintiff's pretrial
20 statement, he indicated that he anticipated introducing the 2012 organizational chart at trial.
21 Declaration of Christy Palmer ¶11. This chart was the subject of summary judgment motions with
22 respect to Plaintiff's re-employment claims. Defendants offered the Declaration of Larry Keeton
23 explaining that the organizational chart incorrectly identified Plaintiff as a DFM 2 and that this
24 mistake was merely the result of a typographical error. Dkt 108, 114. In fact, Plaintiff himself has
25 admitted that he was a DFM 1. Dkt 25-1, pp. 2-9, Dkt. 106, pp. 9, 91:16-18.
26
27
28

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083
www.kitsapgov.com/pros

1 During the July 16, 2014 telephone conference, Defendants offered to provide Plaintiff
2 with a correct version of the organizational chart for use as an exhibit. Declaration of Christy
3 Palmer ¶11. Plaintiff agreed to reconsider the issue of whether he will seek to admit the incorrect
4 2012 organizational chart. Id. However, this issue has not been fully resolved and therefore
5 Defendants seek a ruling excluding the incorrect 2012 chart from evidence.

6 Evidence or testimony regarding the incorrect 2012 organizational chart should be
7 excluded from trial for several reasons. First of all, it is irrelevant to Plaintiff's claims of
8 retaliation and instead relates purely to Plaintiff's dismissed failure to re-employ claims. Fed. R.
9 Evid. 401. This organizational chart has no bearing on any fact or issue in dispute. The only
10 reason for Plaintiff to introduce such evidence and testimony would be to prejudice Defendants by
11 highlighting an error that has no bearing on any relevant fact or to improperly suggest that
12 Defendants should have re-employed Plaintiff as a DFM 2, despite this Court's ruling to the
13 contrary. Fed. R. Evid. 403. Finally, introduction of this evidence will result in confusion and
14 waste of time. If Plaintiff introduces the organizational chart, Defendants will have to take the
15 time to have their witnesses explain the typographical error.

16
17
18 **X. 2007 Job Application Materials.**

19
20 This Court should exclude any and all evidence or testimony regarding Plaintiff's 2007
21 application for a DFM 2 position with Kitsap County. As explained extensively in summary
22 judgment briefings, the Fire Marshal's Office attempted to hire a second DFM 2 in 2007. Dkt. 34,
23 ¶10. Plaintiff applied to this position as well as a second individual. Id. However, due to budget
24 concerns, this position was never funded and Kitsap County never conducted interviews to fill this
25 position. Id. It is anticipated that Plaintiff will attempt to accuse Defendants of failing to promote
26 him to this DFM 2 position in 2007 and suggest that Defendants did not let him interview for this
27
28

1 position because of his military status, or for some other improper purpose. However, the Court
2 has dismissed all of Plaintiffs' status-based discrimination, hostile work environment, constructive
3 discharge, and failure to re-employ claims. Accordingly, any inference of impropriety on
4 Defendants' part with respect to the 2007 application is irrelevant and highly prejudicial. Fed. R.
5 Evid. 403. In fact, any reference to Plaintiff's 2007 DFM 2 application is irrelevant for any
6 purpose as it has no bearing on any issue or fact relevant to Plaintiff's retaliation claims. Fed. R.
7 Evid. 401.

8 Furthermore, this evidence should also be excluded to the extent Plaintiff intends to suggest
9 or assert that he would have been a successful DFM 2 candidate in 2007. Such an assertion is
10 highly speculative. There is no guarantee or any evidence to suggest that Plaintiff would have
11 been promoted to this position.

12 **Y. Extra Help Policy.**

13 This Court should exclude all evidence and testimony regarding Kitsap County's policy
14 regarding extra help employees. Plaintiff identified Kitsap County's extra help policy as a trial
15 exhibit in his pretrial statement. This policy governs Kitsap County's hiring and retention of extra
16 help employees, employees who are hired for specific temporary projects or a limited duration.
17 Declaration of Christy Palmer ¶12. However, this document is not relevant to the issue of whether
18 Defendants retaliated against Plaintiff for filing an ESGR complaint. Fed. R. Evid. 401.
19 Defendants anticipate that Plaintiff intends to use this document to argue or infer that Defendants
20 improperly retained extra help employees following Plaintiff's re-employment with Kitsap County.
21 This is improper because the Court has already dismissed all claims related to this allegation. The
22 introduction of this evidence would merely result in prejudice by suggesting that the jury should
23 determine issues of liability and damages based upon Plaintiff's unfounded speculation that
24 Plaintiff would have been promoted to this position.

1 Defendants improperly retained extra help employees. Fed. R. Evid. 403.
2

3 **Z. Reference Letters.**

4 The Court should exclude all evidence and testimony regarding reference letters written on
5 Plaintiff's behalf. In his pretrial statement, Plaintiff listed as trial exhibits reference letters written
6 on his behalf by James Read, Jody Matson, and Jeff Coombe. Declaration of Christy Palmer ¶13.
7 These letters were not submitted as part of his 2013 application for the DFM 2 position and were
8 written after the date of Plaintiff's interview and after the date of Ms. Blackwood's selection for
9 the position. Id. There is no evidence that these reference letters were provided to Defendant at
10 any time for consideration as part of Plaintiff's interview and application. These reference letters
11 do not have any bearing on whether Defendants retaliated against Plaintiff. They merely appear to
12 represent how other individuals not associated with Defendants felt about Plaintiff. For these
13 reasons, the reference letters are irrelevant. Fed. R. Evid. 401.

14 Reference letters are also inadmissible because they are hearsay pursuant to Fed. R. Evid.
15 801, 801. The reference letters are not sworn statements. They were not made under oath. The
16 credibility of the individuals who wrote these letters cannot be judged by the jury.

17 Finally, these letters should be excluded because they are prejudicial. Fed. R. Evid. 403.
18 In addition to offering no probative value to the issues at trial, these letters will improperly suggest
19 that the jury should determine issues of liability not based upon relevant facts but based upon
20 irrelevant opinions of individuals who are not witnesses and who were not involved in Plaintiff's
21 interview or application process.

22 **AA. City of Boise, Idaho's Policy Manual.**

23 The Court should exclude any and all evidence regarding the employment policies of
24 Plaintiff's current employer. The issues at trial are whether Kitsap County retaliated against

1 Plaintiff by selecting Jackie Blackwood for the DFM 2 position instead of Plaintiff and in
2 removing him from the fire investigation rotation. The provisions of the City of Boise, Idaho's
3 Policy Manual or any other evidence regarding its policies will not offer any probative value to
4 these issues. Fed. R. Evid. 401. Allowing such evidence at trial will be highly prejudicial as it
5 will suggest to the jury that they can hold Defendants liable for violations of the City of Boise,
6 Idaho's policies and procedures even though these policies and procedures do not apply to Kitsap
7 County. Fed. R. Evid. 403. This evidence may also improperly suggest to the jury that Kitsap
8 County's policies are somehow deficient, an unsupported claim which Plaintiff has never made.
9

10
11 To the extent Plaintiff intends to use this evidence to demonstrate the amount of continuing
12 wage loss damages, this should be prohibited by the Court. Plaintiff's claim of constructive
13 discharge was dismissed by the Court. In so ruling, the Court held that Defendants were not
14 responsible for Plaintiff's decision to resign from the Fire Marshal's Office. Accordingly, any
15 damages related to employment wages and benefits are cut-off at the point in which Plaintiff
16 voluntarily left Kitsap County. Plaintiff is not entitled to use evidence and testimony regarding the
17 City of Boise's policies and procedures to establish continuing wage loss.
18

19 This evidence should also be excluded on the basis of hearsay pursuant to Fed. R. Evid.
20 801 and 802. Plaintiff's own testimony regarding the formal employment policies of the City of
21 Boise, Idaho constitutes hearsay and the written policy manual itself is also hearsay and is not self
22 authenticating. Plaintiff has identified no witness who is qualified to discuss these policies or
23 authenticate the policy manual. There is no hearsay exception which applies to this type of
24 evidence. Fed. R. Evid. 803.
25

26 **BB. City of Boise Pay Records.**
27

28 The Court should exclude all evidence and testimony regarding Plaintiff's current pay or

1 pay records with the City of Boise. This evidence is irrelevant pursuant to Fed. R. Evid. 401
2 because it has no bearing on the issue of Defendants' liability. Similarly, it has no bearing on
3 Plaintiff's economic damages. In dismissing Plaintiff's constructive discharge claims, the Court
4 has ruled that Defendants are not responsible for Plaintiff's decision to resign from the Fire
5 Marshal's Office. Accordingly, any damages related to wages and benefits are cut-off at the point
6 in which Plaintiff voluntarily left Kitsap County in August 2013. Plaintiff is not entitled to use
7 evidence and testimony regarding his pay records, wages, or benefits related to his employment
8 with the City of Boise to establish continuing wage loss.

9
10 Allowing this evidence to be presented to the jury will result in prejudice to Defendants as
11 it will likely encourage a jury to award a greater amount of economic damages based upon
12 irrelevant evidence, emotions, and sympathies rather than logical inferences derived from the
13 relevant and material facts. Fed. R. Evid. 403.

14 DATED this 17th day of July, 2014.
15

16 RUSSELL D. HAUGE
17 Kitsap County Prosecuting Attorney
18

19 /S/ *Christy Palmer*

20 JACQUELYN M. AUFDERHEIDE, WSBA No. 17374
21 DEBORAH A. BOE, WSBA No. 39365
22 CHRISTY PALMER, WSBA No. 42560
23 Deputy Prosecuting Attorneys
24 Attorneys for Defendants
25
26
27
28

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083
www.kitsapgov.com/pros

1

2 **CERTIFICATE OF SERVICE**

3

4 I hereby certify that on July 17, 2014, I electronically filed the foregoing with the Clerk of
the Court using the CM/ECF system, which will send notification of such filing to the following:

5 Matthew Z. Crotty
6 Crotty & Son, PLLC
7 421 W. Riverside Avenue, Suite 1005
8 Spokane, WA 99201-0420
matt@crottyandson.com

9 Thomas G. Jarrard
10 Law Office of Thomas G. Jarrard
11 1020 N. Washington Street
12 Spokane, WA 99201-2237
TJarrard@att.net

13 Michael B. Love
14 Workland & Witherspoon
15 601 West Main Avenue, Ste 714
16 Spokane, WA 99201
mlove@workwith.com

17 DATED this 17th day of July, 2014, at Port Orchard, Washington.

18 
19 _____
20 Batrice Fredsti, Legal Assistant
21 Kitsap County Prosecutor's Office
22 614 Division Street, MS-35A
23 Port Orchard, WA 98366
24 (360) 337-4992
25 bfredsti@co.kitsap.wa.us